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REAL PROPERTY

by

Charles R. Butler*

I. CONDEMNATION AND RESTRICTIVE COVENANTS

INVERSE Condemnation. In *City of Dallas v. Ludwick*¹ the city appealed an inverse condemnation judgment awarding damages to a landowner. Ludwick, the landowner, claimed that the city had taken or damaged his property because it denied him a building permit on the grounds that the building would be located in a proposed right-of-way for street expansion. Subsequent to the denial of the building permit Ludwick obtained approval for and built a smaller building. When he learned that the city no longer intended to enlarge the street, Ludwick sued the city, claiming that the denial of the building permit amounted to a taking under the Texas Constitution.² Reversing the trial court, the court of appeals found that the denial of the building permit did not proximately cause any damage to Ludwick because evidence showed that the original, larger building could have been built on the tract without overlapping the proposed right of way.³ The court further noted that there was no evidence that the relocation would have caused any loss in the building's value or utility, or that the landowner would have been inconvenienced by the change.⁴

*Durden v. City of Grand Prairie*⁵ was an inverse condemnation action in which an improperly constructed storm sewer caused surface water to drain across and damage the landowners' property. The landowners sued for compensation for property taken and, in the alternative, damages based upon theories of negligence and nuisance. The plaintiffs also sought injunctive relief. The appellate court held that the continuous flow of water across the property amounted to a taking under the Texas Constitu-

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1. 620 S.W.2d 630 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.).

2. The Texas Constitution provides: "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made" TEX. CONST. art. I, § 17.

3. 620 S.W.2d at 632.

4. *Id.*

5. 626 S.W.2d 345 (Tex. Ct. App.—Fort Worth 1981, writ ref'd n.r.e.).

tion because the flow was of a recurring nature.⁶ The court affirmed the trial court's take nothing judgment, however, because the plaintiff failed to introduce evidence relevant to the proper measure of damages.⁷ According to the court the correct measure of damages for a taking is the difference between the market value just before construction of the improvements and the market value immediately after such construction.⁸ The landowners in this case failed to produce evidence of the market value of the property immediately before and after 1969, the date when the storm sewer was constructed.⁹

Eminent Domain. In *United States v. 50 Acres of Land*¹⁰ the United States condemned land the city of Duncanville owned and operated as a sanitary landfill. In the condemnation suit Duncanville sought to recover substitute-facilities compensation rather than the fair market value of the property.¹¹ Concluding that the city was entitled to recover only the fair market value, the court stated that substitute-facilities value is only available when market value "cannot be determined or would provide inadequate compensation."¹² The court further stated that property is subject to the substitute-facilities measure of compensation only when the condemnee has a factual or legal obligation to replace the facilities.¹³ The court concluded, however, that substitute-facilities value should not be awarded when a fair market value can be established.¹⁴ The compensation required by the fifth amendment is that required to make the condemnee whole, and allowing substitute-facilities compensation in this case would give a windfall to the city by replacing outdated facilities with modern ones.¹⁵

6. *Id.* at 347. The court stated: "To establish a taking, in a case such as this, the Durdens must establish that the injury to their property is repeated and recurring rather than sporadic." *Id.* (citing *Brazos River Authority v. Graham*, 163 Tex. 167, 354 S.W.2d 99 (1961)).

7. 626 S.W.2d at 348.

8. *Id.* In deciding to measure damages as of the time of taking, the court rejected the measure of recovery used in *Tarrant County Water Control & Improvement Dist. No. 1 v. Fowler*, 175 S.W.2d 694 (Tex. Civ. App.—Dallas 1943, writ ref'd w.o.m.), in which the court based damages upon the decrease in the property's value at the time of trial. The court noted that in *Durden* the plaintiffs pleaded only for a taking under the constitution, whereas the plaintiffs in *Fowler* asserted both a taking and damages. *Id.* at 347-48.

9. *Id.* at 348. The only evidence produced by the landowners to prove a decrease in market value was a 1979 appraisal. The two-year statute of limitations barred the plaintiffs' negligence and nuisance theories because the cause of action accrued in 1969 or shortly thereafter. *Id.* (citing the rule in *Atlas Chem. Indus., Inc. v. Anderson*, 524 S.W.2d 681, 684 (Tex. 1975) that "an action for permanent damages to land accrues for limitations purposes upon the first actionable injury").

10. 529 F. Supp. 220 (N.D. Tex. 1981).

11. The jury found that the cost of a substitute facility was substantially greater than the fair market value of the condemned property. *Id.* at 221.

12. *Id.* at 222. The court noted that market value is usually too difficult to determine when either no market for the property exists or a prior sales price does not reflect the current market value. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 222-23. The court also held that the city had failed to introduce evidence to

Restrictive Covenants. In *Shaver v. Hunter*¹⁶ the court construed the single family residency use requirement in a subdivision's restrictive covenants. The covenant limited use of the lots to residential purposes and defined residence to be a "single family dwelling."¹⁷ The defendant leased his property in the subdivision to a nonprofit corporation that used the property to house three severely handicapped unrelated single adult women and a health care provider. Local homeowners brought suit for an injunction and alleged that the defendant's use of the property violated the subdivision's single family residency restrictions. The defendant contended that the covenant restricted only the type of building, not its use and occupancy. Affirming the trial court's decision to enjoin the defendant, the court of appeals held that the restrictive covenant was clearly intended to restrict the use of the property to a single family residence.¹⁸

The court also disagreed with the defendant's contention that the four unrelated single women were a single family and thereby complied with the restrictive covenant.¹⁹ Relying on the Texas Supreme Court's decision in *Southampton Civic Club v. Couch*²⁰ that a family is "a household, including parents, children and servants, and, as the case may be, lodgers or boarders,"²¹ the court concluded that four single adults could not constitute a family.²² In response to defendant's additional argument that the covenant was unenforceable as being against public policy, the court decided that it would be unconstitutional to waive the covenant for handicapped people and yet enforce it against everyone else.²³

support its claim for interest on the difference between the amount of money deposited with the court and the eventual condemnation award at a rate higher than the statutory six percent. *Id.* at 223-24.

16. 626 S.W.2d 574 (Tex. Ct. App.—Amarillo 1981, writ ref'd n.r.e.).

17. *Id.* at 575.

18. *Id.* at 577. The court followed the general rule that use of the term "dwelling house" in building restrictions refers to the structure's use rather than its form. *Id.* at 576-77. The court acknowledged that when a covenant restricts only the type of structure rather than the use, courts have allowed group living arrangements within the structure. *Id.* at 576; see *Malcolm v. Shamie*, 95 Mich. App. 132, 290 N.W.2d 101 (1980); *J.T. Hobby & Son v. Family Homes*, 302 N.C. 64, 274 S.E.2d 174 (1981).

19. 626 S.W.2d at 577. The court noted that most courts in defining the term "single family residence" construe "single family" to mean "nuclear family" or "extended family." A nuclear family includes parents, children, and domestic servants. See *Rudy v. Southampton Civic Club*, 271 S.W.2d 431 (Tex. Civ. App.—Waco 1954, writ ref'd n.r.e.). An extended family "consists of a nucleus group of persons related by blood, marriage or adoption which may include parents, children and collateral kinsmen such as grandparents, grandchildren, uncles, aunts, nieces and the like" and may also include domestic servants and incidental boarders. *Id.*

20. 159 Tex. 464, 322 S.W.2d 516 (1958).

21. *Id.* at 467, 322 S.W.2d at 518.

22. 626 S.W.2d at 578. The court noted that no Texas opinion had suggested expanding the *Southampton* definition to cover four unrelated single adults. *Id.* In a concurring opinion Justice Countiss stated that he would define a family as "a stable housekeeping unit of two or more persons who are emotionally attached to each other and share a relationship that emulates traditional family values, promotes mutual protection, support, happiness, physical well-being and intellectual growth and is not in violation of the penal laws." *Id.* at 579. Under this definition the four residents in *Shaver* could remain without violating the covenant. *Id.*

23. *Id.* at 578-79.

A restrictive covenant case of first impression in Texas was *Turner v. England*,²⁴ in which the defendants appealed a decision enjoining the construction of a tennis court on their property. A restrictive covenant covering the property provided: "No building, fence or other structure shall be constructed on any building site nearer to the front lot line or nearer to the side street line than the minimum setback required by the building line shown on the recorded plat."²⁵ The trial court had granted the injunction after finding that the concrete slab of the tennis court was a structure and that a portion of the slab would be placed so as to violate the covenant. Applying the general principle that "a restrictive covenant must be construed strictly against those seeking to enforce it, resolving all doubts in favor of a free use of the property,"²⁶ the court of appeals held that the concrete slab was not a structure within the meaning of the restrictive covenant.²⁷ Consequently, the court held that construction of the tennis court would not violate the covenant and dissolved the injunction.²⁸

Attorneys' fees. Article 1293b provides that the court shall award attorneys' fees to a prevailing party in an action for breach of a restrictive covenant pertaining to real property.²⁹ Two cases considered an issue of first impression: whether the award of attorneys' fees under article 1293b is mandatory or within the trial court's discretion. In *Inwood North Homeowners' Association, Inc. v. Meier*³⁰ the trial court refused to grant attorneys' fees for the plaintiff even though it ruled in the plaintiff's favor by permanently enjoining the defendants' violation of a restrictive covenant. On the basis of its interpretation of the statute the court of appeals reversed the trial court's denial of attorneys' fees.³¹ Applying the rule that words of a statute should be given their plain meaning, the court concluded that the use of the word "shall" in the statute rather than "may" made the award of attorneys' fees under article 1293b mandatory rather than permissive.³² The court further held that the plaintiff did not forfeit its right to attorneys' fees under article 1293b by incorrectly citing the statute number in its petition because the pleadings gave fair notice to the defendants of the plaintiff's claim.³³ In *Meyerland Community Improve-*

24. 628 S.W.2d 213 (Tex. Ct. App.—Eastland 1982, writ ref'd n.r.e.).

25. *Id.* at 214.

26. *Id.* at 216.

27. *Id.* The court noted that within the same subdivision there were street lights, fences, stone walls, paved driveways and a swimming pool beyond setback lines and that there was no contention that they were structures. In addition, no part of the tennis court beyond the setback line was to be above ground level. *Id.* at 215-16.

28. *Id.* at 216.

29. Article 1293b provides: "(a) In an action based on breach of a restrictive covenant pertaining to real property, the court shall allow a prevailing party who asserted the action for breach of a restrictive covenant, reasonable attorney's fees, in addition to his costs and claim." TEX. REV. CIV. STAT. ANN. art. 1293b (Vernon 1980).

30. 625 S.W.2d 742 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ).

31. *Id.*

32. *Id.* at 743-44.

33. *Id.* at 744-45. The court also relied upon the policy that a party must complain of technical defects in a timely and specific manner. *Id.* at 745.

*ment Association v. Belilove*³⁴ the court of appeals ruled that defendants who prevailed in an action based on violation of restrictive covenants were not entitled to recover attorneys' fees because article 1293b allows fees to be awarded only to a prevailing plaintiff.³⁵

II. MECHANICS' AND MATERIALMAN'S LIENS

Foreclosure. The court of appeals considered a deceptive trade practice claim for wrongful foreclosure of a mechanics' and materialman's lien in *Dickinson State Bank v. Ogden*.³⁶ The Ogdens hired a builder to construct a house and executed a mechanic's lien contract with power of sale. The builder then pledged the contract and his note to a bank securing an interim loan to finance the construction. The lien contract provided that upon the contractor's failure to complete the improvements or provide the materials and labor,

then contractor or other owner and holder of the herein described indebtedness and note shall have a valid and subsisting lien for said contract price, less such amount as would be reasonably necessary to complete said improvements according to said plans and specifications or in such event the owner and holder of the hereinabove mentioned indebtedness and note, at his option, shall have the right to complete said improvements, and the liens herein given shall inure to the benefit of said owner and holder.³⁷

When the contractor subsequently defaulted, the bank posted the property for foreclosure, and the Ogdens filed suit to enjoin the sale. After the bank answered by filing suit to recover on its note and foreclose its lien, the Ogdens asserted an additional cause of action under the Deceptive Trade Practices Act.³⁸ The trial court rendered judgment for the property owners, and the bank appealed, contending that the transaction was not covered by the Act because the Ogdens were not consumers. Following the definition of consumer in *Cameron v. Terrell & Garrett, Inc.*,³⁹ the court of appeals determined that the property owners were consumers within the meaning of the Act and thus were protected by its provision.⁴⁰ The court

34. 624 S.W.2d 620 (Tex. Ct. App.—Houston [14th Dist.] 1981, no writ).

35. *Id.* at 620-21. Defendants argued that they were entitled to attorneys' fees under art. 2226, which allows fees to be recovered on a valid contract claim. *See* TEX. REV. CIV. STAT. ANN. art. 2226 (Vernon Supp. 1982-1983). The court rejected defendants' claim because they did not present a claim as required by the statute. 624 S.W.2d at 621.

36. 624 S.W.2d 214 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ granted).

37. *Id.* at 219.

38. TEX. BUS. & COM. CODE ANN. §§ 17.41-.62 (Vernon Supp. 1982-1983).

39. 618 S.W.2d 535 (Tex. 1981). The Texas Supreme Court held in *Cameron* that "a person need not seek or acquire goods or services furnished by the defendant to be a consumer as defined in the [Act]." *Id.* at 541. *But see* TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon Supp. 1982-1983) (consumer is an individual who seeks or acquires any goods or services).

40. 624 S.W.2d at 217. The property owners alleged that the bank violated the Act by: "1. Representing that an agreement confers or involves the rights, remedies or obligations which it does not have or involve, or which are prohibited by law. 2. Breach of an express or implied warranty. 3. Committing an unconscionable action or course of action." *Id.*; *see* TEX. BUS. & COM. CODE ANN. § 17.46(b) (Vernon Supp. 1982-1983).

held that the attempt to foreclose was a deceptive trade practice in that the bank thereby represented that the lien contract conferred rights and remedies that it did not have.⁴¹ According to the court the bank did not have a right to foreclose its lien pursuant to the contract until a binding determination of the cost to complete the improvements had been made.⁴² The court reasoned that "[p]rior to that time the trustee making the sale would be unable to determine how much to pay the owner of the note pursuant to his responsibility of making disbursement of the proceeds of the sale."⁴³ The court allowed the Ogdens to recover three times the difference between the "increased cost [of completion] resulting from delay produced by a deceptive trade practice" and the amount the bank recovered on its note.⁴⁴

Conversion: Whirlpool Doctrine. *P&T Manufacturing Co. v. Exchange Savings & Loan Association*⁴⁵ was a materialman's suit against an interim lender for conversion and breach of fiduciary duty. Exchange Savings & Loan, the interim finance construction lender, had foreclosed deed of trust liens and refused to let P&T remove certain cabinets and countertops that P&T had installed on the property. Although P&T contended that it had a materialman's lien on the cabinets and countertops at the time of the foreclosure, it did not sue to foreclose its alleged lien. Instead, P&T took the position that the lender had converted the cabinets and countertops.

Finding that P&T had no cause of action for either conversion or breach of fiduciary duty, the court of appeals affirmed the trial court's summary judgment for the lender.⁴⁶ For the purposes of its opinion the court assumed that the cabinets and countertops could be removed without material injury to the property or improvements.⁴⁷ The appellate court held, however, that as a matter of law a materialman may not seek removal of property or assert conversion until he has judicially foreclosed his lien, thereby establishing possession of the property.⁴⁸ The court of appeals also rejected P&T's claim that Exchange Savings & Loan had breached a fiduciary duty, holding that an interim construction lender is not in the position of a trustee to insure the payment of materialmen.⁴⁹

41. 624 S.W.2d at 220; see TEX. BUS. & COM. CODE ANN. § 17.46(b)(12) (Vernon Supp. 1982-1983).

42. 624 S.W.2d at 219-20.

43. *Id.*

44. *Id.* at 221-22.

45. 633 S.W.2d 332 (Tex. Ct. App.—Dallas 1982, writ ref'd n.r.e.).

46. *Id.*

47. *Id.* at 333; see *First Nat'l Bank v. Whirlpool Corp.*, 517 S.W.2d 262, 269 (Tex. 1974) (materialman's lien is superior to prior deed of trust lien when property can be removed without material injury to the land, to pre-existing improvements, or to property removed).

48. 633 S.W.2d at 333. Conversion requires an unlawful exercise of dominion and control over property in defiance of another's right to possess it. In this case P&T could only establish a right to possession by foreclosing its lien. *Id.*

49. *Id.* at 333-34.

III. LANDLORD AND TENANT

Indefinite Lease Term. In *Philpot v. Fields*⁵⁰ the landowner, by a written and recorded lease, leased property to Fields for twenty years and as long thereafter as he used it for a specified purpose. After the twenty-year term had run, the landowner brought suit to have the lease declared unenforceable. The landowner asserted that the lease became a tenancy at will after the twenty-year term expired and was thus terminable by either party. The court of appeals decided that even though there was no definite duration, the end of the term was "tied to the cessation of the use of the land for certain definitely ascertainable purposes."⁵¹ Recognizing that perpetual rights are not favored, the court stated that the clear intent of the parties to create a perpetual right to lease the property should be enforced.⁵²

Forcible Detainer. The appellate court in *Rushing v. Smith*⁵³ considered whether the county court could award damages to the nonprevailing party in a forcible detainer action. When the plaintiff brought suit to recover possession of real property, the justice court awarded possession to the plaintiff subject to the defendant's right to harvest his crop.⁵⁴ In his appeal to the county court the defendant filed a cross action for the cost of preparing the crop and for attorneys' fees. The county court awarded the property to the plaintiff and \$3,300 to the defendant. The court of appeals adopted the plaintiff's position that "the only damages recoverable in a forcible detainer suit are those suffered by the prevailing party in withholding or defending possession, and court costs."⁵⁵ Because the defendant was not the prevailing party, and his damages were unrelated to his expense in defending possession, the court reformed the county court's judgment by deleting the defendant's award of costs and attorneys' fees.⁵⁶ The court noted, however, that the defendant could still bring an action in a court of competent jurisdiction to recover his expenses.⁵⁷

IV. TITLE AND OWNERSHIP PROBLEMS

Condominium Owner's Tort Liability. One case during the survey period decided the extent to which an individual condominium unit owner may

50. 633 S.W.2d 546 (Tex. Ct. App.—Texarkana 1982, no writ).

51. *Id.* at 548. The court noted that the lease specifically set forth the parties' rights and obligations. *Id.* Moreover, the lessee used the property in accordance with the lease continuously since the beginning of the term and made timely payments of all rent. *Id.* at 547.

52. *Id.* at 548. The court applied the rule that the parties' intent is given effect "when expressed in an unambiguous writing." *Id.*

53. 630 S.W.2d 498 (Tex. Ct. App.—Amarillo 1982, no writ).

54. Right to actual possession is the only issue in a forcible detainer action. TEX. R. CIV. P. 746. A suit for rent and attorneys' fees may be joined if it is within the jurisdictional limits of the justice court. The court did indicate, however, that the defendant could maintain his suit in a court of competent jurisdiction. 630 S.W.2d at 500.

55. 630 S.W.2d at 499; see TEX. R. CIV. P. 752. The court decided that the limitation on damages in rule 752 applies when a forcible detainer suit is joined with a cross action that alleges other damages. 630 S.W.2d at 499.

56. 630 S.W.2d at 500.

57. *Id.*

be liable to a third party for tortious conduct that occurs in the condominium's common area. *Owens v. Dutcher*⁵⁸ involved tort liability for damage to personal property resulting from a fire started by an improperly installed light fixture in the common area of a condominium. The tenants who owned the property filed suit against the owner of the unit and others to recover their damages.⁵⁹ The jury found that the negligence of the condominium association, of which the owner was a member, was the sole cause of the fire. The court rendered judgment for the plaintiffs, but determined the amount of the defendant's liability by prorating the total amount of damages determined by the jury on the basis of the owner's undivided ownership share of the common elements. The tenants appealed the decision, contending that the owner should be liable for the total damages, not just his proportionate share. Noting that neither case law nor the Texas Condominium Act⁶⁰ covered the issue, the court of appeals relied upon the nature of condominium ownership in Texas to reverse the trial court.⁶¹ The court found that each unit owner is a tenant in common with the other unit owners in the common property and is, therefore, jointly and severally liable for damage claims arising in the common area.⁶² Consequently, the defendant unit owner was liable for one hundred percent of the damages.⁶³

Construction of Deed. In *Reeves v. Tower*⁶⁴ the defendants recorded a plat of a subdivided tract of land and sold a lot to the plaintiffs by a deed conveying "[a]ll that certain tract or parcel of land . . . being Lot No. One (1) in Section 'B' in GLEN OAKS SUBDIVISION . . . as the same is marked and designated upon the duly recorded map and plat of said subdivision."⁶⁵ The recorded plat showed the notation "Reserved by Owner" on a strip of land within lot one, but the general warranty deed conveying the property did not contain the exception. The plaintiffs filed a trespass to try title suit to have the strip of land declared their property. The trial court found that the sellers had reserved the land in question by the notation on the plat. The court of appeals reversed and held that the deed conveyed lot one in its entirety.⁶⁶ Applying traditional rules of construction to the deed, the court decided that the deed notation referred to land

58. 635 S.W.2d 208 (Tex. Ct. App.—Fort Worth 1982, writ granted).

59. The tenants sued the owner of the condominium unit, the condominium association, the electric company, the condominium developer, and a class of owners of the other condominium units.

60. TEX. REV. CIV. STAT. ANN. art. 1301a (Vernon 1980).

61. 635 S.W.2d at 209-11. In Texas the condominium concept involves the merger of two estates: the unit owner has a fee simple in the unit and a tenancy in common in the common elements. *Id.* at 209.

62. *Id.* at 211. The court stated: "In the absence of a statutory limitation, there appears to be no escape-proof method of insulating the unit owners in a condominium regime from unlimited liability resulting from negligent maintenance and operation of these premises." *Id.* at 210.

63. *Id.* at 211.

64. 621 S.W.2d 209 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.).

65. *Id.* at 211.

66. *Id.* at 214.

described in the plat and not to land conveyed.⁶⁷ In addition, the court reasoned that the sellers could not have reserved any property to themselves prior to execution of the deed because they already owned the entire lot in fee.⁶⁸ The court also noted that the language of the deed conveyed "all" the property.⁶⁹ According to the court the remaining words merely made the description certain and did not constitute a reservation.⁷⁰

Purchases and Sales. *Lefevere v. Sears*⁷¹ involved a dispute over possession of harvested crops after a contract to purchase the land failed to close. The plaintiff contracted to purchase from the defendant farm land on which he had growing crops. The parties subsequently executed a written amendment to the contract whereby the purchaser agreed to pay the cash price by a certain date or the contract would terminate, and the seller would acquire possession of the property and title to all growing crops. When the sale failed to close by the agreed upon date, the seller harvested and retained the crops. The purchaser filed suit to recover either the crops or their value under equitable principles, alleging invalidity of the forfeiture provision.⁷² The trial court ruled that the amendment converted the sales contract into an option to purchase and reasoned that when the buyer failed to exercise his option by the specified date, the seller was entitled to the crops as liquidated damages.⁷³ Reversing the trial court, the court of appeals decided that instead of creating an option, the amendment merely extended the time of payment and provided a penalty for failure to close.⁷⁴ Citing the rule that damages for breach of contract must provide just compensation for the loss actually sustained,⁷⁵ the court further held that the forfeiture provision was unenforceable as a penalty because it did not bear a reasonable relation to the seller's actual damages.⁷⁶

67. *Id.* at 213.

68. *Id.*

69. *Id.*

70. *Id.* The court stated:

[T]he law relating to conveyances should remain ever such so as to require the contracting parties, and especially the grantor, to make definite and certain the meaning of the deed by the use of proper language which exactly and definitely describes the estate to be conveyed. Under no circumstances should the law be relaxed to include within the purview of the deed, by construction, a reservation solely to the owner a part of the land described in the grant unless clearly compelled by the language in the deed itself.

Id.

71. 629 S.W.2d 768 (Tex. Civ. App.—El Paso 1981, no writ).

72. The purchaser did not file suit for specific performance of the purchase contract.

73. *Id.* at 770. The court of appeals noted that there are no damages for failure to exercise an option because the buyer is not obligated to purchase the property. *Id.*

74. *Id.* at 771.

75. See *Stewart v. Basey*, 150 Tex. 666, 245 S.W.2d 484 (1952).

76. 629 S.W.2d at 771-72. The court stated that in order to enforce the forfeiture provision the harm caused by the breach must be "incapable or difficult of estimation" and the amount of liquidated damages must be "a reasonable forecast of just compensation." *Id.* at 771; see RESTATEMENT (SECOND) OF CONTRACTS § 339 (1979); TEX. BUS. & COM. CODE ANN. § 2.718(a) (Vernon 1968). The damages would be a penalty in this case because the value of the crop was from \$109,000 to \$119,000 whereas the land was valued at \$174,000. 629 S.W.2d at 772.

Brokers. The court in *Corman v. Carlson*⁷⁷ considered whether a letter that purported to be a commission agreement satisfied the requirements of the Real Estate License Act.⁷⁸ A real estate agent had brought suit against the owner of a shopping center to recover a commission for negotiating a lease for space in the center. The only written agreement was a letter that provided: "This letter is to serve as our commission agreement for negotiating a lease with Denny's Inc. for a donut store at the Richardson East Shopping Center located at Belt Line and Plano Road in Richardson, Texas. Mr. Brown and Mr. Corman agree to pay Bob Carlson the commission amount of \$8,424."⁷⁹ The shopping center owner appealed the trial court's ruling that the agent was entitled to the commission, claiming that the letter was not sufficient to satisfy the requirement of the Real Estate License Act that a commission agreement must be in writing and signed by the person to be charged.⁸⁰ The court of appeals tested the sufficiency of the letter agreement under the statute of frauds standard that a writing must contain or refer to the means by which the land may be described with reasonable certainty.⁸¹ Noting that the property actually leased was different from that described in the letter, the court decided that the writing failed to satisfy the statute of frauds because it did not describe the property to be leased with reasonable certainty.⁸²

In a second case concerning real estate brokers, *Canada v. Kearns*,⁸³ the plaintiffs purchased a real estate salesperson's own house, which was listed with the defendant's agency. The purchasers filed suit against the defendant broker to recover damages resulting from the salesperson's misrepresentation about the condition of the roof. Appealing the trial court's decision, the defendant contended that she was not liable as a broker because she did not receive a fee for the sale.⁸⁴ The court of appeals, however, decided that the defendant was a broker and that she was liable for the misrepresentation because the seller was the broker's salesperson, and the house was "advertised, listed, and sold through defendant's agency."⁸⁵

Statute of Frauds. The Texas Supreme Court in *Nagle v. Nagle*⁸⁶ consid-

77. 638 S.W.2d 21 (Tex. Ct. App.—Dallas 1982, no writ).

78. TEX. REV. CIV. STAT. ANN. art. 6573a, § 20(b) (Vernon Supp. 1982-1983).

79. 638 S.W.2d at 22.

80. *Id.*; see TEX. REV. CIV. STAT. ANN. art. 6573a, § 20(b) (Vernon Supp. 1982-1983).

81. 638 S.W.2d at 22; see TEX. BUS. & COM. CODE ANN. § 26.01 (Vernon 1968 & Supp. 1982-1983).

82. *Id.* at 22. The court relied upon the rule that "[w]hen a writing describes land only as part of a larger tract, without further identification of the tract to be conveyed, it will not satisfy the statute of frauds." *Id.*

83. 624 S.W.2d 755 (Tex. Civ. App.—Beaumont 1981, no writ).

84. The Real Estate License Act provides that a real estate broker is one who sells or lists real estate "for another person and for a fee, commission or valuable consideration, or with the intention or in the expectation or on the promise of receiving or collecting a fee, commission, or other valuable consideration from another person." TEX. REV. CIV. STAT. ANN. art. 6573a, § 2(2) (Vernon Supp. 1982-1983).

85. 624 S.W.2d at 756. The court found that even though there was no fee paid to the defendant, she "was motivated by the hope of receiving 'other valuable consideration.'" *Id.*

86. 633 S.W.2d 796 (Tex. 1982).

ered a claim based upon breach of an oral agreement to convey real estate. The oral agreement arose out of a settlement proposal the plaintiff made to her former husband who had failed to pay child support payments to the plaintiff. In order to avoid appearing before the court in a contempt hearing, the husband agreed to convey his interest in certain real estate to the plaintiff.⁸⁷ After the plaintiff's attorney passed the scheduled hearing, the husband refused to make the conveyance. He did, however, pay the missed amount of child support, which the plaintiff accepted. Nevertheless, the plaintiff, who had not attempted to reschedule the hearing, brought suit to enforce the oral promise or to recover damages.⁸⁸ The trial court ordered the defendant to pay money damages, and the court of appeals affirmed, holding that the plaintiff proved a cause of action for common law fraud.⁸⁹

The Texas Supreme court first noted that under the statute of frauds the promise had to be in writing to be enforceable.⁹⁰ Although equitable exceptions to this requirement exist,⁹¹ the court found that no exception applied in this case.⁹² In particular, the court decided that promissory estoppel did not apply to avoid the statute of frauds.⁹³ According to the court the plaintiff suffered no harm because she had the opportunity to reschedule the hearing.⁹⁴ Additionally, the court found that the plaintiff did not have an action for common law fraud.⁹⁵

Fraud. In *Trenholm v. Ratcliff*⁹⁶ a homebuilder who purchased several lots

87. After the plaintiff's former husband missed making the payments plaintiff filed a contempt motion and a hearing was set. Plaintiff then offered to forego the hearing and waive one month's child support if her former husband would convey his interest in the property, pay the child support not yet received, and increase the amount of future support payments.

88. The plaintiff also asked for damages from her attorney if the claim against her former husband was denied. The trial court rendered a judgment n.o.v. for the attorney, and the appellate court and supreme court affirmed. *Id.* at 799, 801. Justice McGee concurred. *Id.* at 801.

89. *Id.* at 799.

90. *Id.*; see TEX. BUS. & COM. CODE ANN. § 26.01 (Vernon 1968 & Supp. 1982-1983).

91. The court discussed the exceptions set forth in *Hooks v. Bridgewater*, 111 Tex. 122, 229 S.W. 1114 (1921) and "*Moore*" *Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934 (Tex. 1972). *Hooks* provided that a contract is exempt from the statute of frauds if there has been "payment of the consideration, adverse possession by the purchaser, and his making of valuable and permanent improvements." 111 Tex. at 128, 229 S.W. at 1116. The court in "*Moore*" *Burger* allowed a claim of promissory estoppel to defeat a statute of frauds defense. The court in *Nagle* noted that the promissory estoppel exception had been limited to apply to cases where the promise was to sign a written agreement that met the statute of frauds requirements. 633 S.W.2d at 800.

92. 633 S.W.2d at 799-800.

93. *Id.* at 800.

94. *Id.* The court also concluded that the plaintiff's waiver of the support payment did not constitute a substantial injury. *Id.*

95. *Id.* at 800-01. To support its decision the supreme court distinguished the cases relied upon by the court of appeals in finding an action for fraud. *Id.*

96. 636 S.W.2d 718 (Tex. Ct. App.—Dallas 1982, writ granted). This is an appeal from the second trial of the case. The first trial court rendered judgment for the home builder, and the court of appeals reversed and remanded. *Ratcliff v. Trenholm*, 596 S.W.2d 645 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.).

from the developer of a subdivision in order to construct and sell houses brought a common law action in fraud and deceit against the developer. At a meeting to promote the sale of the lots, the developer made a presentation in which he described the location of a mobile home park adjacent to the subdivision as a future shopping area and assured the homebuilder that the mobile home park would be moved. The homebuilder proceeded to construct six houses in the subdivision. During a second meeting the developer conceded that there was no immediate plan to move the park, but the homebuilder continued to purchase lots in the subdivision and build houses.⁹⁷ In the homebuilder's suit against the developer the issue was whether the homebuilder relied upon the representation that the mobile home park would be moved. The court of appeals held that as a matter of law the homebuilder did not rely upon the misrepresentation because he purchased additional lots after learning that the mobile home park would not be moved.⁹⁸ In addition, the court rejected the homebuilder's theory that these lots were part of a "total building program" and, therefore, reliance as to one lot meant reliance as to the rest.⁹⁹

Additional Title And Ownership Problems. In *Malone v. Whitfield*¹⁰⁰ the court of appeals determined that a road situated between two private lots had been acquired by the public through dedication and public acceptance because sufficient evidence of public use existed.¹⁰¹ In a case involving reformation of deeds, *Thalman v. Martin*,¹⁰² the Texas Supreme Court ordered that two deeds be reformed because of a mutual mistake in the exchange of mineral interests.¹⁰³ Holding that the defendants had established title by adverse possession, the court of appeals in *Dalo v. Laughlin*¹⁰⁴ concluded that the plaintiff's filing of a previous suit did not toll the statute of limitations because the plaintiff had voluntarily nonsuited.¹⁰⁵

V. MORTGAGES

Due on Sale Clauses. The Texas Supreme Court held the use of an optional due on sale clause to be valid and enforceable in *Sonny Arnold, Inc. v. Sentry Savings Association*.¹⁰⁶ A deed of trust contained a provision that gave the lender the option to accelerate the entire balance of the debt if the mortgaged property was sold. In addition, the agreement expressly pro-

97. The homebuilder entered into a joint venture with a savings and loan association for the purchase of twelve additional lots. Five of the lots were purchased before the second meeting and seven were purchased after the second meeting.

98. *Id.* at 721. The homebuilder conceded that he could not have relied upon the misrepresentation as to the lots purchased after the second meeting.

99. *Id.*

100. 621 S.W.2d 192 (Tex. Civ. App.—Waco 1981, writ ref'd n.r.e.).

101. *Id.* at 195.

102. 635 S.W.2d 411 (Tex. 1982).

103. *Id.* at 414.

104. 636 S.W.2d 585 (Tex. Ct. App.—San Antonio 1982, no writ).

105. *Id.* at 586, 589.

106. 633 S.W.2d 811 (Tex. 1982).

vided that the lender could increase the interest rate even if it approved of the purchaser's credit and management ability. When the mortgaged property was sold without the lender's consent, the lender accelerated the balance of the debt and posted the property for trustee's sale.¹⁰⁷ Thereafter, the purchasers and seller sought a temporary injunction to enjoin the trustee's sale. The injunction was denied at the trial level and granted by the court of appeals in order to preserve its jurisdiction.¹⁰⁸ On appeal the plaintiffs contended that the due on sale clause was invalid as an illegal restraint on alienation. The court of appeals, however, upheld the use of the clause and dissolved the writ of temporary injunction.¹⁰⁹

Upholding the court of appeals decision to dissolve the writ, the Texas Supreme Court decided that the clause was not an unreasonable restraint on alienation.¹¹⁰ The court first noted that the plaintiffs sought application of the rule set out by the California Supreme Court in *Wallenkamp v. Bank of America*,¹¹¹ that "a due-on clause contained in a promissory note or deed of trust cannot be enforced upon the occurrence of an outright sale unless the lender can demonstrate that enforcement is reasonably necessary to protect against impairment to its security or the risk of default."¹¹² Before addressing the issue of reasonableness the court in *Sonny Arnold* determined whether there was a restraint on alienation under the *Restatement of Property*,¹¹³ which specifies three types of restraints: disabling, promissory, and forfeiture.¹¹⁴ Finding that the clause was neither a disabling nor a forfeiture restraint because the clause did not void a conveyance or terminate a property interest, the court considered whether the clause was a promissory restraint.¹¹⁵ According to the court the restraint is promissory if the clause attempts to "cause a later conveyance to impose contractual liability on the one who makes the later conveyance *when such liability results from a breach of an agreement not to convey.*"¹¹⁶ Because the clause in question did not contain a promise not to convey and did not impose contractual liability on the transferor, the court found that the

107. The lender had agreed to let the purchasers assume the debt if the interest rate on the loan was raised from 9.75% to 10.5%. The terms of the sale, however, provided that the purchasers did not assume the debt. Rather, the seller remained liable and agreed to indemnify the purchasers from any liability arising out of the debt or the deed of trust. *Sonny Arnold, Inc. v. Sentry Sav. Ass'n*, 615 S.W.2d 333 (Tex. Civ. App.—Amarillo 1981), *aff'd*, 633 S.W.2d 811 (Tex. 1982).

108. 615 S.W.2d at 334; *see Sonny Arnold, Inc. v. Sentry Sav. Ass'n*, 602 S.W.2d 90 (Tex. Civ. App.—Amarillo 1980), 615 S.W.2d 333 (Tex. Civ. App.—Amarillo 1981), *aff'd*, 633 S.W.2d 811 (Tex. 1982).

109. 615 S.W.2d at 340. For a report of this decision, see Butler, *Real Property: Landlord and Tenant, Mechanics' and Materialmen's Liens, and Foreclosure, Annual Survey of Texas Law*, 36 Sw. L.J. 67, 91-93 (1982).

110. 633 S.W.2d at 815.

111. 21 Cal. 3d 943, 582 P.2d 970, 976-77, 148 Cal. Rptr. 379, 385-86 (1978).

112. 582 P.2d at 976-77, 148 Cal. Rptr. at 385-86.

113. 633 S.W.2d at 814-15.

114. *Id.* at 813, n.2 (citing RESTATEMENT OF PROPERTY § 404 (1944)).

115. 633 S.W.2d at 813-14.

116. *Id.* at 814 (footnote omitted; emphasis by the court) (citing RESTATEMENT OF PROPERTY § 404(1)(b) (1944)).

clause was not the type of restraint on alienation prohibited by the *Restatement of Property*.¹¹⁷ The court further noted that a contractual provision for an acceleration remedy must be "clear and unequivocal" in order to be enforceable.¹¹⁸ Under this standard the court found that the clause clearly stated that there would be no acceleration if the transferee agreed to an increase in the interest rate; therefore, the clause was valid and enforceable.¹¹⁹

Appointment of Substitute Trustee. The question in *Springwoods Shopping Center, Inc. v. University Savings Association*¹²⁰ was whether mortgagors in default had a wrongful foreclosure action against the mortgagee when the property was sold by a substitute trustee who failed to comply with certain deed of trust qualification requirements. The deed of trust¹²¹ provided that the beneficiary could appoint a substitute trustee by merely putting the appointment in writing and recording the writing. The instrument appointing the substitute trustee was not filed until two days after the foreclosure sale. In their wrongful foreclosure suit the mortgagors claimed that the sale conducted by the substitute trustee was invalid because he did not have power to act as trustee until the proper notice was filed. As a defense the mortgagee contended that the recording of the appointment is a ministerial act, and that the deed of trust provisions should not be strictly construed.¹²² The court of appeals noted that Texas courts require strict adherence to the deed of trust provisions because of the special nature of the substitute trustee's position.¹²³ Under this standard the court concluded that the mortgagors did have a cause of action for wrongful foreclo-

117. 633 S.W.2d at 814-15.

118. *Id.* at 815.

119. *Id.* at 815-16. The court concluded that a lender's requirement that a transferee agree to a higher rate serves a valid business purpose. *Id.* at 815. Justice Spears, joined by Justices Campbell, Ray, and Wallace, wrote a concurring opinion in which he took the approach that the clause was a restraint on alienation and, therefore, the case should have been decided on the basis of reasonableness. *Id.* at 819. Nevertheless, Justice Spears agreed with the outcome because the restraint was not unreasonable in this case. *Id.* at 821. The concurring justices found the distinction significant because basing the decision on reasonableness would not foreclose consideration of other restraint provisions. *Id.*

120. 635 S.W.2d 440 (Tex. Ct. App.—Houston [1st Dist.] 1982, writ granted).

121. The deed of trust secured a promissory note given in a loan transaction between the mortgagors and the mortgagee. On the date that the mortgagee appointed the substitute trustee, the mortgagors were several months behind in payments on the note. A few days later the mortgagors received notice that the mortgagee was declaring the balance of the note due, and that the substitute trustee would foreclose the liens under the note and deed of trust.

122. The trial court granted a summary judgment for the mortgagors, but decreed that they take nothing. *Id.*

123. *Id.* at 442. The court discussed the holdings in *Burnett v. Manufacturer's Hanover Trust Co.*, 593 S.W.2d 755 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.), and *Faine v. Wilson*, 192 S.W.2d 456 (Tex. Civ. App.—Galveston 1946, no writ), that substitute trustee's actions were invalid because the trustee did not comply with the appointment provisions. *Burnett* held that a substitute trustee not appointed in accordance with the deed of trust provisions is not authorized to sell property. 593 S.W.2d at 757. In *Faine* the court held that the notices of sale were of no force and effect and that the sale was invalid because the appointment had not been recorded prior to the closing as required by the deed of trust. 192 S.W.2d at 459-60.

sure because the substitute trustee sold the property while he was not properly appointed.¹²⁴

In *Veltmann v. Hoffman*¹²⁵ the mortgagees posted property for sale for three consecutive months under the powers of their deed of trust. They postponed the sale for the first two months in order to give the mortgagors time to secure another loan. Prior to the date of the third scheduled foreclosure sale, the mortgagors sought a temporary injunction to stop the sale, claiming that the mortgagees had waived their right to nonjudicial foreclosure by passing foreclosure the two previous months.¹²⁶ The court of appeals, affirming the trial court's refusal to grant the injunction, held that the mortgagees had not waived their right to foreclose.¹²⁷ The court stated that it knew "of no case holding that a lienholder who, at the request of the debtor, postpones a nonjudicial foreclosure sale in order to afford the debtor an opportunity to avoid loss of his land is to be penalized by being deprived of the right to foreclose."¹²⁸

Miscellaneous Mortgage Cases. On the issue of subrogation the court of appeals in *Leonard v. Brazosport Bank*¹²⁹ held that a lien holder was contractually and equitably subrogated to a prior valid lien holder's rights, including the right to foreclose, because proceeds of the loan were used to pay off the prior loan.¹³⁰ In *Bank of Woodson v. Hibbits*¹³¹ the appellate court found that a future indebtedness clause in a deed of trust executed by a son, his wife, and his mother to secure a note did not secure four subsequent notes executed only by the son.¹³²

The court of appeals in *Getto v. Gray*¹³³ held that a debtor's payments exceeding the minimum amount due under his note should have been credited to the installments first maturing; therefore, the note was not in default, and the noteholders could not accelerate the debt.¹³⁴ In *Fretz Construction Co. v. Southern National Bank*¹³⁵ the Texas Supreme Court allowed a construction contractor to prevail on the theory of promissory estoppel against an interim construction lender who failed to set aside funds from the loan adequate to pay the construction company.¹³⁶

124. 635 S.W.2d at 444.

125. 621 S.W.2d 441 (Tex. Civ. App.—San Antonio 1981, no writ).

126. The mortgagors also claimed estoppel.

127. *Id.* at 442-43. The court relied on *Cox v. Medical Center Nat'l Bank*, 424 S.W.2d 954, 957 (Tex. Civ. App.—Houston [14th Dist.] 1968, no writ) (temporarily foregoing foreclosure acts as a temporary waiver and does not estop the lien holder from effecting subsequent foreclosure).

128. 621 S.W.2d at 442.

129. 628 S.W.2d 216 (Tex. Ct. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.).

130. *Id.* at 219 (citing *Lewis v. Investors Sav. Ass'n*, 411 S.W.2d 794, 796 (Tex. Civ. App.—Fort Worth 1967, no writ)).

131. 626 S.W.2d 133 (Tex. Ct. App.—Eastland 1981, writ ref'd n.r.e.).

132. *Id.* at 135.

133. 627 S.W.2d 437 (Tex. Ct. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.).

134. *Id.* at 440.

135. 626 S.W.2d 478 (Tex. 1981).

136. *Id.* at 481.

